82-103

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN AND DOLORES RANK,

Petitioners,

vs.

ROBERT P. NIMMO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

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QUESTION PRESENTED

A federal statute (38 U.S.C. § 1816(a)) grants the Administrator of the Veterans Administration (VA) the discretion to refund a VA-guaranteed home loan and assign the loan to the VA, which can then arrange for payments on that loan which will allow a deserving veteran going through temporary hard times to keep his or her home. The question presented is whether the Administrator, who admittedly has wide discretion in an individual case, may refuse to exercise that discretion by refusing to consider <u>any</u> loan for an assignment.

LIST OF PARTIES BELOW

The parties to this proceeding in the United States Court of Appeals for the Ninth Circuit were:

1. Max Cleland, in his capacity as Administrator of the Veterans Administration; the court below subsequently substituted the name of his successor, Robert P. Nimmo.

2. John Miller, in his capacity as Director of the Los Angeles Regional Office of the Veterans Administration.

3. The Veterans Administration, an agency of the United States government.

4. The Kissell Company, an Ohio corporation.

5. John W. Rank, a citizen of California.

6. Dolores Rank, a citizen of California.

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The petitioners, John and Dolores Rank, plaintiffs and appellees, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 23, 1982, and modified by separate order filed on May 6, 1982.

OPINION BELOW

The opinion of the Court of Appeals and the Order modifying that opinion, reported at 677 F.2d 692 (9th Cir. 1982), appear in the appendix hereto. The judgment of the District Court of the Central District of California, entered October 3, 1978, and the Findings of Fact and Conclusions of Law filed July 7, 1978,

reported sub. nom. Rank v. Cleland, 460 F. Supp. 920 (C.D. Cal. 1978), also appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 23, 1982 and modified by separate order on May 6, 1982. A timely Petition for Rehearing and Rehearing En Banc was denied on May 6, 1982, and this Petition for Certiorari is to be filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 38:

Section 1816(a):

In the event of default in the payment of any loan guaranteed under this chapter, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty. Before suit or foreclosure the holder of the obligation shall notify the Administrator of the default, and within thirty days thereafter the Administrator may, at the Administrator's option, pay the holder of the obligation

the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security. Nothing in this section shall preclude any forbearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Administrator.

United States Code, Title 5:

Section 706(1):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action lawfully withheld or unreasonably delayed;

STATEMENT OF THE CASE

John W. Rank, a veteran, and his wife Dolores bought a home secured by a loan guaranteed by the VA. See 38 U.S.C. §§ 1801 et seq. They fell behind on their loan payments when John Rank was laid off from his job because of an economic recession. The Ranks tried repeatedly to persuade the servicer of their loan, The Kissell Company, to grant them forebearance, and proposed partial payment plans to the company. They also sought to persuade the VA to intercede on their behalf. The Ranks' efforts were unsuccessful and Kissell instituted nonjudicial foreclosure proceedings. Findings of Fact 1-36,[1/]

1/The Findings of Fact and Conclusions of Law were renumbered when the trial court published them. The citations in this petition are to the orignal Findings and Conclusions as reproduced in the Appendix.

Appendix at 86.

The VA failed even to consider exercising its option under 38 U.S.C. § 1816(a) to assign the Ranks' loan to itself and provide direct forebearance to the Ranks. As with every other loan in the Los Angeles area, a VA official merely completed a form by crossing out the word "IS" in the sentence "REFUNDING IS/IS NOT WARRANTED." Appendix at 126. From 1974 through 1976, when the Ranks' loan was in default, there were more than 6,000 foreclosures of VA-guaranteed home loans in the Los Angeles area, but the VA did not assign and refund one single loan. Findings of Fact 38, 55, Appendix at 101, 106. In addition, the Ranks were never even informed of the possibility of assignment. Findings of Fact 58, Appendix at 107. As the district court ultimately concluded,

"From 1974 through 1976 . . . VA refused to implement the assignment program in the Los Angeles region." Conclusion of Law 12, Appendix at 113.

Following the foreclosure proceedings, the Ranks filed suit in federal district court seeking to set aside the foreclosure. The district court found that jurisdiction lay under 28 U.S.C. § 1331(a) (federal question); and 28 U.S.C. § 1361 (mandamus). 460 F. Supp. at 926, Appendix at 111.

On cross motions for summary judgment, the trial court ruled in favor of the Ranks. The court ordered that the foreclosure of their loan be set aside and that the matter be remanded to the VA to decide whether to grant the Ranks an assignment.[2/] Appendix at 76.

2/ The Administrative Procedure Act directs reviewing courts to "compel agency action unlawfully withheld . . ." 5 U.S.C. § 706(1).

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Judge Reinhardt, in a carefully reasoned opinion, dissented on the issue of the VA's failure to exercise its statutory discretion. He concluded that "the VA cannot ignore the [assignment] statute." 677 F.2d at 705-06, Appendix at 58.

The Ranks petitioned for rehearing and suggested rehearing en banc, focusing solely on the issue of the VA's failure to exercise discretion under the assignment statute. The Court of Appeals denied the petition and rejected the suggestion, with Judge Reinhardt again dissenting. Both the majority opinion and dissent were modified at that time.

REASONS FOR GRANTING THE WRIT

This Court has never squarely decided the question whether a statute that grants an administrative agency wide authority to exercise individualized discretion permits a refusal to exercise that discretion. The Court of Appeals opinion can be fairly read for the proposition that administrative agencies need not exercise their discretion under statutes worded in non-mandatory terms unless Congress expressly specifies otherwise. As will be discussed, this opinion raises an issue that should be decided by this Court because of the question's impact on the relationship between the executive and legislative branches; the inconsistency of the opinion with prior appellate decisions;

and the damage done by the opinion to the Congressional goal of aiding veteran homeowners.

I. THE COURT OF APPEAL'S VALIDATION OF AN ADMINISTRATIVE AGENCY'S REFUSAL TO EXERCISE STATUTORY DISCRETION THREATENS TO ALTER THE RELATIONSHIP BETWEEN CONGRESS AND ADMINISTRATIVE AGENCIES

The decision below, by validating the VA's refusal to exercise its statutory discretion, threatens the delicate balance between the legislative and executive branches in implementing discretionary statutes. The United States Code contains literally hundreds of statutes that grant discretion to administrative

agencies to implement Congressional policy in individual cases; Title 38, which governs the VA, contains at least 30 such statutes. Often the statute will specify standards for implementation, and the exercise of that discretion will be subject to judicial review. 5 U.S.C. § 701; see generally Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). Occasionally, however, "'statutes are drawn in such broad terms that in a given case there is no law to apply'" and the exercise of discretion under that statute will be unreviewable. Id. The court below held that Title 38, Section 1816(a), which allows the VA Administrator, "at his option," to refund and assign VA-guaranteed home loan, is such a statute. The Ranks in this petition do not contest that holding.

It does not follow, however, that because a statute does not prescribe standards sufficiently detailed to invoke judicial review the statute can therefore be ignored. To take that leap of logic, as the Court of Appeals did, misinterprets the purpose of standardless statutes and places both Congress and administrative agencies at a disadvantage.

Standardless statutes, as this Court has recognized, allow Congress to defer to recognized areas of administrative expertise. Fahey v. Mallonee, 332 U.S. 245, 250 (1947). In this case, Section 1816(a) defers to the expertise of the VA in balancing the needs of the government and the veteran in a particular case and determining whether a loan assignment should be granted. But the refusal to make that individual determination requires

no expertise. At best, the VA's refusal to exercise discretion is a policy decision that a statute should not exist. Congress, not the VA, should make that policy decision. Or, at least Congress should expressly state that the agency has the expertise justifying a refusal to exercise statutory discretion.

The opinion places Congress and ultimately administrative agencies in an untenable position. In order to prevent the kind of nonfeasance exhibited by the VA in this case, Congress would have to review the numerous standardless statutes such as Section 1816(a). For each statute, it would either have to add superfluous language directing that the statute should not be ignored and discretion must be exercised, or impose standards governing the exercise of discretion. In either

case, Congress would run the risk of placing rigid restraints on the exercise of agency discretion, a result which would be undesirable for Congress, administrative agencies and the general public. A better solution would be to preserve the judicial presumption that when Congress grants an agency discretion, it intends that the discretion be exercised unless expressly stated otherwise.

II. THE OPINION BELOW IS VIRTUALLY UNPRECEDENTED, AND RUNS COUNTER TO CASE LAW PROSCRIBING ADMINISTRATIVE FAILURE TO EXERCISE STATUTORY DISCRETION

The opinion below conflicts with case law generally prohibiting administrative failure to exercise statutory discretion. While this Court has never directly decided the issue herein, on at least two occasions the Court has assailed administrative refusal to exercise discretion. In Accardi v. Shaughnessy, 347 U.S. 260 (1954), an immigrant challenged the denial by the Board of Immigration Appeals of his application for suspension of deportation. This Court held that the Board was required

to make an individualized determination of the immigrant's right to suspension of deportation and could not automatically exclude him on improper grounds. The Court stated, "It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. . . . Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations." Id. at 268 (emphasis in original). In Phelps Dodge v. Labor Board, 313 U.S. 177 (1941), the Court condemned a National Labor Relations Board action taken without consideration of the individual circumstances involved in the case. "All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." Id. at 197.

Closer to the facts of this case is United States v. Edwards, 368 F.2d 722 (4th Cir. 1966), which concerned a challenge by a claimant to the failure of the Treasury Secretary to remit forfeited property. Without examining the language of or the intent behind the remission statutes, the court assumed the general validity of the proposition that remission of forfeitures of "this kind of taxable property is within the sole, exclusive, and discretionary province of the Secretary of the Treasury and the courts are without power to review his decisions." 368 F.2d at 723. Nevertheless, the court declared, "it is still somewhat startling to be told by counsel for the United States in oral argument that taxpayer's petition for administrative relief had been denied but that no reasons for the denial had

been communicated to the taxpayer. It is further asserted to us . . . that it is the invariable policy of the Secretary to deny such claims for remission of forfeiture . . ." Id. at 723-24.

The appellate court vacated a district court ruling against the taxpayer and suggested that the trial court determine on remand, inter alia, "to what extent, if at all, is there an established policy in the Treasury Department to deny such applications without consideration of the merits." Id. at 724. The court suggested that if the allegations were true the Secretary should be ordered to act upon the merits of the remission application. In the present case, in which the Ranks were never even told of the possibility of assignment, much less given reasons for denial (Findings of Fact

58, 59, Appendix at 107), and the administrative policy of nonfeasance has been proved, the judgment of the district court requiring a similar exercise of discretion should have been affirmed.

The Ninth Circuit itself has condemned the failure to exercise discretion in other cases. In Standard Oil Co. of Cal. v. F.T.C., 596 F.2d 1381 (9th Cir. 1979), reversed on other grounds, 449 U.S. 232 (1980), an oil company challenged the Federal Trade Commission's initiation of a complaint against it, alleging that the agency violated a statute providing that the FTC may file a complaint against a company if it has determined that there is a "reason to believe" that illegal practices have taken place. The court held that if "the district court finds that the complaint was issued . . . with

complete absence of a 'reason to believe' determination, then the FTC has not complied with the Act." Id. at 1386. Significantly, the court did not refer to any express Congressional intent that the statute be implemented. See also Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971), holding that a statute giving the Commissioner of Indian Affairs the power to promulgate such regulations governing trading posts "as he may deem just and proper" did not permit him to refuse to regulate.

The only authority relied on by the Court of Appeals in support of its decision to validate VA inaction is Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958), a case first cited by the court below in its order denying rehearing.

Panama Canal Co. involved a challenge by shipping companies to the considered refusal of an administrative agency to lower allegedly improper tolls, as opposed to a complete failure to exercise discretion. The Court's sweeping statement that "the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" can only be viewed as dictum, as the refusal to lower tolls in that case was action, not inaction.

Furthermore, the precedential value of Panama Canal is very much open to question. It has never been cited or relied upon by this Court in any subsequent case treating the reviewability of an agency's action or inaction. The Fifth Circuit has stated, "[T]he continued vitality of the Panama Canal case as precedent is

questionable," Chevron Oil Co. v. Andrus, 588 F.2d 1383, 1391, n.14 (5th Cir. 1979), while Judge Friendly labeled it "inscrutable." Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (1971). In addition, there are numerous cases which mention Panama Canal, but draw factual distinctions in order to render it irrelevant. W.G. Cosby Transfer & Storage Corp. v. Froehlke, 480 F.2d 498, 503 (4th Cir. 1973), Kentucky Utilities Co. v. Tennessee Valley Authority, 375 F.2d 403, 415 (6th Cir. 1967), Dutchess County Aviation v. Adm. of the FAA, 251 F. Supp. 426, 429 (S.D.N.Y. 1966). The Ninth Circuit's reliance, without reservation on the most sweeping dictum in Panama Canal threatens to lead to wholesale approval of administrative nonfeasance in defiance of more recent, better reasoned authority. For

that reason alone, the issue justifies a hearing in this court.[3/]

3/ The Third Circuit, a few weeks after Rank was first issued, made a similar holding in Gatter v. Nimmo, 672 F.2d 343 (3d Cir. 1982). The Gatter ruling was based almost entirely on the Third Circuit's conclusion that the assignment legislation was intended primarily to benefit the government rather than veterans. The accuracy and significance of that conclusion will be discussed in the next section.

III. THE OPINION BELOW UNDERMINES THE CONGRESSIONAL GOAL OF AIDING VETERAN HOMEOWNERS

The question raised herein is significant not only because of its effect on administrative law, but also because it touches upon the interests of hundreds of thousands of veteran homeowners (see Finding of Fact 37, Appendix at 101). whom Congress intended to benefit. By allowing the VA to remove the only weapon in its arsenal to aid a worthy veteran facing foreclosure, the opinion below thwarts the will of Congress.

By footnote (677 F.2d at 700-01, n. 13, Appendix at 44), the opinion below suggests, and the Third Circuit in Gatter v. Nimmo, supra, 672 F.2d 343, states that the assignment clause in Section 1816(a)

was intended primarily to aid the government rather than veterans. Both the accuracy and significance of that observation are open to question, for the Gatter court's conclusion is only partly correct. Section 1816(a) benefits the government and veterans as well.

As part of the Serviceman's Readjustment Act, Act of June 23, 1944, c. 268 (repealed and reenacted as Chapter 37, Title 38, U.S.C. by Public Law 85-857, 72 Stat. 1212 (1958)), Section 1816(a) is part of an act that "evinces an intent to treat mortgagors favorably." Fitzgerald v. Cleland, 650 F.2d 360, 362 (1st Cir. 1981). This Court has often held that statutory language must be read in light of an entire act. Richards v. U.S., 369 U.S. 1, 11 (1962), U.S. v. Witkovich, 353 U.S. 194, 199 (1957). Therefore,

an overall intent to aid veterans cannot be denied.

This design is supported further by the best interpretor of legislative intent, the agency itself. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.") The VA's own manual states that assignment of a loan serves three objectives:

(1) Liquidation of the loan, by the VA at a minimum of expense;

(2) Avoiding the liquidation of the loan, and thereby assisting a worthy veteran to retain his property, with the VA in no worse position by reason of the refunding, or

> (3) Avoiding liquidation of the loan and the acquisition of the property in any case where it would be to the interests of the Government to do so, irrespective of whether the homeowner is the original veteran or a transferee.
>
> VA Manual M26-3, Change 32, § 2.39 (emphasis added).

Thus, as the VA recognizes, one of the objectives served by assignment is benefiting worthy veterans facing foreclosure.

That assignment also serves governmental objectives does not give the VA carte blanche to ignore the law. Undeniably, as the VA itself acknowledges, assignment can be used to aid worthy veterans. It simply makes no sense to

allow the VA to refuse to exercise its discretion under the statute because the statute is also designed to aid the government.

In addition, aiding a veteran and protection of government interests are not mutually exclusive. One result does not negate the other.

By allowing the VA to ignore the assignment statute, the Court of Appeals has helped eliminate the only remedy available to the VA which helps a veteran faced with foreclosure by a recalcitrant lender. While the VA may suspend lenders from the home loan guaranty program because of inadequate servicing practices, that prospective remedy is small comfort to an individual veteran who has lost his or her home. Moreover, as with the assignment option, from 1974 to 1976, the VA

never suspended a lender on these grounds. Finding of Fact 46, Appendix at 104. Other statutes and handbooks allow the VA to try to persuade lenders to grant forebearance, but only through the assignment statute may the VA require it. Allowing the VA to disarm itself of its only means of aiding individual veterans makes a mockery of legislation intended to benefit veteran homeowners.

CONCLUSION

The decision below tampers with the delicate balance between the legislative and executive branches; threatens to resurrect the discredited notion that administrative agencies enforcing discretionary statutes are free to refuse to exercise their discretion; and thwarts

the Congressional goal of aiding the nation's many veteran homeowners. For each of these reasons, the Ranks request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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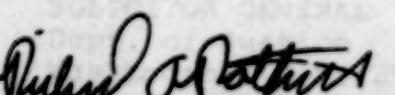
OF LOS ANGELES

By 
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PROOF OF SERVICE

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APPENDIX TO

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN and DOLORES RANK,	)	
	)	
Plaintiffs-Appellees,	)	No. 79-3128
	)	D.C. No.
vs.	)	CV 76-3625-LEW
	)	
ROBERT P. NIMMO,* Administrator of the VETERANS ADMINISTRATION, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	O P I N I O N
JOHN and DOLORES RANK,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
vs.	)	
	)	
ROBERT P. NIMMO,* Administrator of the VETERANS ADMINISTRATION, et al.,	)	No. 79-3205
	)	D.C. No.
	)	CV 76-3625-LEW
	)	
Defendants,	)	
	)	
and	)	
	)	
THE KISSELL COMPANY, an Ohio corporation,	)	
	)	
Defendants-Appellants.	)	

Appeal from the United States
District Court for the
Central District of California
Laughlin E. Waters,
District Judge, Presiding
Argued and Submitted December 1, 1980

Before: WALLACE, NORRIS, and REINHARDT,
Circuit Judges

NORRIS, Circuit Judge:

In 1971, appellees John and Dolores Rank bought a home financed through a mortgage guaranteed by the Veterans Administration (VA) pursuant to the VA Home Loan Guarantee Program, 38 U.S.C. § 1801 et seq. In 1976, the mortgage was foreclosed. The Ranks subsequently brought suit against the VA and the Kissell Company, a private firm that serviced the mortgage, seeking to set aside the foreclosure. On cross-motions

*We substitute the name Robert P. Nimmo, the successor in July 1981 to the original defendant, Max Cleland, pursuant to Fed. R. App. P. 43.

for summary judgment based upon stipulated facts, the district court held that the VA Act and various publications distributed by the VA to implement the loan guarantee program created a duty on the part of the VA and private lenders to take all reasonable measures to avoid foreclosure; that the VA and Kissell had breached this foreclosure avoidance duty; and that the veteran borrower could enforce this duty in an equitable action to set aside a foreclosure. The district court further held that the VA's failure to refund to the lender the unpaid balance of the Rank's loan and receive an assignment of the loan, as authorized by 38 U.S.C. § 1816(a), constituted an abuse of discretion and that the VA had illegally failed to exercise its discretion because it refused to implement an assignment program

in the Los Angeles region. Judgment was entered setting aside the mortgage foreclosure, and this appeal followed.

I.

Statutes, Regulations, and Publications

The policy of the VA housing program "is, broadly stated, to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both the veteran and the Veterans Administration as guarantor of the veteran's indebtedness . . ." United States v. Shimer, 367 U.S. 374, 383 (1961). This policy is effected through a loan guaranty mechanism. A home loan (mortgage) to a qualifying veteran is automatically guaranteed by the VA in an amount equaling 60% of the loan or $27,500,[1] whichever is less. 38 U.S.C. §§ 1803(a)(1) and 1810(c). This guaranty enables the veteran to

obtain a home mortgage, through conventional sources, without making a substantial downpayment; "the guaranty provisions . . . operate as the substantial equivalent of a downpayment in the same amount by the veteran on the purchase price, in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran's home." United States v. Shimer, supra, 367 U.S. at 383.

The veteran obtains the guaranteed loan from private commercial lenders.[2] Such lenders may be denied participation in the veterans' home program if, upon "notice and opportunity for a hearing," the Administrator finds that a lender has failed to keep adequate records, failed "to demonstrate proper ability to service loans adequately," failed to exercise proper credit judgment, or taken actions

detrimental to the government or to the veterans. 38 U.S.C. § 1804(d).

Upon default by a veteran on his mortgage, the private lender must notify the VA within forty-five days, 38 C.F.R. 36.4315, and if the lender intends to foreclose, he may not begin legal proceedings until thirty days after delivering a notice of his intent to the VA. 38 C.F.R. 36.4317. Upon foreclosure, the lender, if he turns out to be the purchaser, generally may convey the property to the VA. 38 C.F.R. 36.4320.

An option known as "refunding" is available to the VA in cases of default. The "Administrator may, at the Administrator's option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and

security." 38 U.S.C. § 1816(a); 38 C.F.R. 36.4318. The VA thus may take over defaulted mortgages from private lenders and avoid foreclosure by extending forebearance to the veteran.

In connection with its home mortgage program, the VA publishes, inter alia, a Lenders' Handbook and issues circulars to its regional offices. The Lenders' Handbook, VA Pamphlet No. 26-7 (Revised), is introduced by a note stating:

"[The Handbook is] designed to guide lenders in the processing of applications for loans . . . and in the treatment of defaults and claims arising through loans made. Nothing contained here shall be construed to modify or otherwise alter any provisions of the regulations." The text of the Lenders' Handbook provides, inter alia:

> It is the policy of the VA, consistent with the beneficial nature of the law, to encourage holders [servicers] to extend all reasonable forebearance in the event a borrower becomes unable to meet the terms of his loan. Its purpose is to help veteran-borrowers retain their homes, farms and businesses without prejudicing the holders' rights under their contracts of guaranty or insurance. . . . [I]t is not expected that holders will file claims or institute action to terminate loans, until every reasonable effort has been made to arrive at some other solution.

The Lenders' Handbook advises lenders "to follow accepted standards of loan servicing employed by prudent lenders generally" and notes that the "VA may, where the circumstances warrant, supplement the holder's efforts in connection with the servicing of defaulted loans." It points out, however, that the loan guaranty "is in part predicated upon the

understanding that adequate loan servicing will be performed by the holder" and that [t]he VA does not prescribe how loans should be serviced."

In Circular 26-75-8, sent to its employees in January 1975, the VA pointed to adverse economic conditions and ordered its employees to attempt to ameliorate veterans' economic difficulties. Specifically, the VA employees were instructed to review carefully each notice of default to determine if servicing was adequate, to urge private lenders to perform adequate loan servicing, to counsel veterans with mortgage problems, and to undertake supplemental servicing when necessary. See VA Manual M26-3, Change 46, 2.35.

Finally, VA Manual M26-3 (intended for use by VA employees) provides criteria,

in cases of default, to guide VA employees in exercising the assignment/ refunding option authorized by 38 U.S.C. § 1816(a). Paragraph 2.39(d) of that Manual states that refunding is permissible when it is "established beyond reasonable doubt that:

1. The refunding will be in the best interests of the VA.

2. The default was not willful.

3. The borrower is desirous of retaining his property.

4. The borrower is deserving of VA assistance."

II.

The Factual Background

The material facts in this case were stipulated. In 1971 plaintiffs, John and Dolores Rank, bought a home in Pomona, California for $16,950 and financed their purchase through a loan for the full

purchase price from Trinity Mortgage Company. The VA guaranteed the loan pursuant to its housing program. Ultimately, after several transactions, the loan (which was secured by a deed of trust--i.e., a mortgage) and mortgage were assigned to the Government National Mortgage Association (GNMA), with a private mortgage firm called the Kissell Company acting as the servicing agent. The Ranks were to pay the Kissell Company $148 per month.

Throughout the 1973-74 period, the Ranks had difficulty making their loan repayments on time, but they eventually would cure their delinquencies. Beginning with the payment due in February 1975, however, the Ranks failed to make further payments. John Rank had been laid off from his $900 per month job in December

1974, and was subsisting on $360 per month in unemployment benefits, except for two months of salary as a welder. A Kissell representative, C. B. Cohen, subsequently met with the Ranks, but was unable to resolve the non-payment problem. A later meeting was similarly unsuccessful, as Cohen concluded that the Ranks' expenses exceeded their income.[3] In the meantime, the Valley Association of Cities (VAC) had contacted the VA and Kissell regarding the Ranks, and John Rank himself wrote to the VA. In late May, the VA contacted Kissell and was informed that Kissell would consider forebearance upon presentation of a "more definite" repayment plan. Later, Cohen told VAC that the Ranks should offer a written plan, which they eventually did.[4]

There were subsequent communications among Kissell, the VA, VAC, and the Ranks. Ultimately, though, Kissell sent to the VA, in September 1975, a Notice of Intention to Foreclose. It stated that the borrower's "income is less than his expenses," and that "no arrangements can be made due to the borrower's financial problems". Kissell gave notice to the Ranks of the impending foreclosure, and the VA informed the Ranks that it could do nothing for them. In early 1976, John Rank had obtained employment and made a new repayment proposal to Kissell, but it was refused.

In December 1975, a Notice of Default was recorded in Los Angeles County pursuant to California law. In April 1976, the property was sold at a non-judicial foreclosure sale to Kissell. Pursuant to

VA regulations, Kissell then conveyed the property to the VA as part of the guaranty arrangement. Just before the foreclosure sale, in April 1976, the VA concluded that assignment/refunding (pursuant to 38 U.S.C. § 1816(a) and 38 C.F.R. 36.4318) was "not warranted."[5]

III

District Court Proceedings and Decision

The Ranks filed this lawsuit in October 1976, seeking, in essence, an invalidation of the mortgage foreclosure and restoration of their ownership rights on the grounds that "defendants failed to perform adequate servicing as mandated by the Veterans' Home Guaranty Program . . ." and that the "VA abused its discretion by failing to consider plaintiffs for an assignment under 38 U.S.C. § 1816(a) . . ." The Ranks also sought relief on the

ground that the foreclosure of their mortgage "by non-judicial means" was "violative of the Fifth Amendment to the United States Constitution."

On cross-motions for summary judgment, the district court ruled in favor of plaintiffs. 460 F. Supp. 920 (C.D. Cal. 1978). The court held that 38 U.S.C. § 1801 et seq. and 38 C.F.R. 36.4300 et seq. "impliedly require that VA guaranteed home loans be adequately serviced by the Veterans Administration and private lenders," and that the VA's Lenders' Handbook, its Circular 26-75-[8], and its internal manuals "impliedly require that VA and private lenders must take all reasonable measures to avoid foreclosure." Further, according to the district court, these "foreclosure avoidance rules impose mandatory duties on both private lenders

and the Veterans Administration," and "are not binding . . . notwithstanding the fact that they were not published in the Federal Register pursuant to the Administrative Procedure Act . . ."

The court concluded from the stipulated facts that the VA and Kissell had violated their mandatory "foreclosure avoidance" duties in this case. "Veteran borrowers," the district court said, "may maintain civil actions against private lenders and VA charging violation of statutory servicing requirements."

The district court ruled finally that the VA's refusal to take an assignment of the plaintiff's home loan, and to refund it, pursuant to the statutory authorization of 38 U.S.C. § 1816(a), "was an abuse of discretion . . . because plaintiffs clearly met VA's own criteria

for assignment set out in VA Manual M26-3, . . ." and because the VA failed to supply reasons for not exercising the assignment/refunding option. The court stated as well that the VA's failure to implement the assignment option in the Los Angeles region in 1974-76 "constituted an illegal failure to exercise discretion."[6]

The Ranks were ordered restored to their ownership position, and the VA was ordered to consider assignment/refunding and to provide reasons for any refusal to exercise that option.[7]

This appeal followed.

IV.

The Foreclosure-Avoidance Issues

A. The VA Act

In Simpson v. Cleland, 640 F.2d 1354 (D.C. Cir. 1981), decided after this appeal was briefed and argued, the D.C.

Circuit held that the well-established principles of Cort v. Ash, 422 U.S. 66 (1975),[8] and its progeny compel the conclusion that no implied cause of action exists under the VA Act against the VA or the private lender for failure to help a veteran borrower avoid foreclosure.

We agree with the D.C. Circuit that neither the statutory language nor the legislative history of the VA Act provides any "indication of legislative intent . . . to create such a remedy" against the private lender. Cort v. Ash, 422 U.S. at 78. The home loan guaranty program was designed to induce private lenders to extend home loans to veterans--with "the guaranty provisions . . . operat[ing] as the substantial equivalent of a down payment." United States v. Shimer, 367 U.S. 374, 383 (1961). It relies on

financial incentives to accomplish a welfare objective and does not purport to confer enforceable federal rights directly on the veteran-borrower. See Shivers v. Landrieu, No. 79-1880, slip. op. at 10-11 (D.C. Cir. March 27, 1981) (mortgage insurance provision of the National Housing Act was intended to induce private entrepreneurs to enter the housing market, thus ultimately redounding to the advantage of veteran tenants, but was not intended to create federal rights in favor of veteran tenants); Roberts v. Cameron-Brown, 556 F.2d 356, 360 (5th Cir. 1977) (Lenders' Handbook outlining foreclosure-avoidance duties delineates the relationship between the government and the private lender and gives the mortgagor no claim to duty owed).

More importantly, "mortgage foreclosure has traditionally been a matter for

state courts and state law, and there are state law remedies available to protect mortgagors from unconscionable mortgages." Roberts v. Cameron-Brown Co., supra, 556 F.2d at 361 (rejecting a private cause of action by mortgagors against private lenders for failure to comply with foreclosure-avoidance guidelines under the HUD-insured home mortgage program). Accordingly, we consider it most improbable that the VA Act was intended to authorize the federal courts to create, with respect to the area of VA-guaranteed home loans, a federal common law of mortgages to supplement or supplant the law provided by the states.[9]

B. The Administrative Procedure Act

The Ranks contend that even if no private cause of action can be derived from the VA Act, the VA's failure to take

foreclosure-avoidance measures is judicially reviewable under § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.

5 U.S.C. § 702 states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 706 (1) directs the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed . . ." These sections of the APA create a right of judicial review of agency action unlawfully withheld. See Rockbridge v. Lincoln, 449 F.2d 567, 569-70 (9th Cir. 1971); Society Hill Civic Assoc. v. Harris, 632 F.2d 1045, 1055 (3rd Cir. 1980). We must therefore consider

whether the VA Act and its regulations create a legally enforceable duty on the part of the VA to take all reasonable measures to avoid foreclosure.

1. Duty of the VA to Provide Supplemental Servicing

It is clear that the VA Act, by its terms, imposes no legal duty upon the VA to undertake loan servicing of VA-guaranteed loans. If such duty exists, it must be derived from statements found in the Lenders' Handbook and VA circulars. We note at the outset "that not all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court." Chasse v. Chasen, 595 F.2d 59, 62 (1st Cir. 1979). In order for the Lenders Handbook and the VA circulars to have the "force and effect of law," they must (1) prescribe substantive rules--not interpretive rules,

general statements of policy or rules of agency organization, procedure or practice--and, (2), conform to certain procedural requirements. Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). The first element requires that the rules be legislative in nature, affecting individual rights and obligations. Id. at 302-03.

In this case, we need not reach the question whether the Handbook and circulars were the product of the requisite procedures, for we conclude that neither the VA Handbook nor VA Circular 26-75-8 purports to prescribe "legislative-type" rules enforceable in federal court against the VA. Rather, we view the portions of the Handbook and circulars cited by the plaintiffs as general statements of agency policy and procedure.

VA Circular 26-75-8, for example, was issued in response to the economic recession of 1974-75 and was apparently intended as a general guide to VA employees in aiding veterans to weather the economic crisis of those years. To hold such a circular binding on the VA would "hamper seriously the ability of departmental administrators to communicate freely and flexibly with the employees of their departments by means of written directives." Chasse v. Chasen, 595 F.2d 59, 65 (1st Cir. 1979) (Campbell, J. concurring). Moreover, the fact that the Handbook and circulars (unlike agency proclamations intended to be binding on the VA) were neither published in the Federal Register nor disseminated to the public for scrutiny and comments offers further support for our view that these

publications were not intended to have the force and effect of law.[10]

Our conclusion that the Handbook and circulars do not create an enforceable duty on the part of the VA to take all reasonable measures to avoid foreclosure is in harmony with the numerous decisions of other courts that have held agency handbooks and circulars of this type unenforceable.[11] See, e.g., Chasse v. Chasen, 595 F.2d 59 (1st Cir. 1979) (Custom Service's circular was an internal policy pronouncement and did not create rights enforceable in federal court); First State Bank of Hudson County v. United States, 599 F.2d 558, 564 (3rd Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (FDIC Manual does not create an enforceable duty on the part of the FDIC to inform Bank about misapplication of its

funds by bank president); Concerned Residents of Buck Hill Falls v. Grant, 537 F. 2d 29, 38 (3rd Cir. 1976) (Soil Conservation Service Handbook and Guide merely govern internal operating procedures and are not enforceable regulations promulgated under the Administrative Procedure Act); Harrison v. Housing Authority of College Park, 445 F. Supp. 356, 358-59 (N.D. Ga. 1978), aff'd, 592 F.2d 281 (5th Cir. 1979) (HUD handbooks are merely advisory); Feldman v. United States Dept. of Housing and Urban Develop., 430 F. Supp. 1324 (E.D. Pa. 1977) (same); Brown v. Lynn, 392 F. Supp. 559, 561-62 (N.D. Ill. 1975) (HUD handbook directing private lenders servicing HUD-insured mortgages to refrain from foreclosure when other procedures were available was intended as a policy guideline and does

not have the force and effect of law).[12]

2. Assignment-Refunding

In addition to holding that the VA and the private lender breached a duty to provide adequate loan servicing, the district court held that the VA abused its discretion by failing to assign and refund the Ranks' loan prior to foreclosure, as permitted by 38 U.S.C. § 1816(a). The VA, however, contends that the decision whether or not to exercise the assignment-refunding option is "committed to agency discretion" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), and thus is not reviewable under that Act.

Section 701(a)(2) states a "very narrow exception" to the mandate of the Administrative Procedure Act that the action of "each authority of the

Government of the United States" is subject to judicial review. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). The exception is applicable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Id. See City of Santa Clara v. Andrus, 572 F.2d 660, 666-69 (9th Cir. 1978), cert. denied, 439 U.S. 859 (1978); Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 978); Arizona Power Authority v. Morton, 549 F.2d 1231, 1239-41 (9th Cir. 1977), cert. denied, 434 U.S. 835 (1977).

The assignment-refunding section of the VA Act, 38 U.S.C. § 1816(a) provides in pertinent part:

> Before suit or foreclosure the holder of the obligation shall notify the Administrator

> of the default and within thirty days thereafter the Administrator may, at the Administrator's option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security.

The statutory language of this section makes clear that Congress intended to vest the widest discretion possible in the Administrator. Congress, in drafting § 1816(a), used the precatory "may" and then, as if to leave no doubt, added, "at the Administrator's option." Neither the statute nor the formal regulations published pursuant to 5 U.S.C. § 553 provide any legal standards by which a decision to assign and refund could be reviewed; and we agree with the courts in Fitzgerald v. Cleland, 498 F. Supp. 341 (D. Me. 1980), aff'd in part, vacated in part, 650 F.2d 360 (1st Cir. 1981) and in

Gatter v. Cleland, 512 F. Supp. 207 (E.D. Pa. 1981), that the criteria for refunding set forth in the VA Manual do not constitute enforceable statutory criteria that can be applied on judicial review. See generally, Section IV. A. 1., supra; see also Nelson v. Andrus, 591 F.2d 1265, 1266 (9th Cir. 1978).

The decision to accept an assignment of a veteran's loan necessarily involves a consideration of myriad factors, including, but not limited to, internal VA management considerations relating to budget and personnel, the risk of loss to the VA, the adequacy of prior loan servicing, and the circumstances of the borrower's default. The application of these factors, as well as the determination of other relevant factors and the weight to be attributed to each, has been

entrusted to the unfettered discretion of the VA. Even if legal standards for review could be divined, it is clear that, absent allegations that the agency has improperly considered factors outside those entrusted to its discretion, the decision whether to assign and refund raises issues not well-suited for determination by the courts. We thus conclude that the VA's decision not to assign and refund appellees' home loan is not judicially reviewable.

The district court also held that the VA's failure to assign and refund any loans in the Los Angeles region from 1974 through 1976 was a refusal to implement the assignment-refunding program and hence an illegal failure to exercise its discretion. Whether the VA is required to implement the assignment refunding

program is essentially an issue of statutory interpretation and within the judiciary's traditional area of expertise. See Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1043-45 (D.C. Cir. 1979). See also Southern Railway v. Seaboard Allied Corp., 442 U.S. 444, 458-59, n.11 (1979) ("'different considerations' apply to the reviewability of an agency 'refus[al] or fail[ure] to exercise statutory discretion' than to the reviewability of its decision once it does exercise that discretion," citing Schilling v. Rogers, 363 U.S. 666, 676-77 (1960)); East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 529 (9th Cir. 1972).

Nothing in the statutory language or history of section 1816(a) indicates that Congress intended to require the VA to

exercise the assignment-refunding option during the years 1974-76. Rather, the language of § 1816(a) indicates that Congress simply intended to empower the VA to refund, at its discretion, loans that are in default. By so doing, Congress provided an additional remedy that the VA may use in the event of an inadequate loan servicing by the lender. See note 9, supra. Both the precatory language of § 1816(a) and the absence of any standards or procedures governing the administrator's exercise of the assignment-refunding option, however, indicate that Congress intended to leave the decision when, if ever, to apply the assignment-refunding remedy within the sound discretion of the Administrator. Thus, the VA is free to adopt a stringent policy with respect to assignment-

refunding remedy within the sound discretion of the Administrator. Thus, the VA is free to adopt a stringent policy with respect to assignment-refunding, reserving the option for the exceptional or unusual case, or, indeed, to adopt no program at all.[13]

This case is readily distinguishable from the cases relied on by the plaintiffs where the applicable statute or legislative history clearly revealed a Congressional intent to require the agency to implement a statutory program. See Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1981) ("There can be no question but that when Congress enacted § 261 it intended that the Commissioner would 'specify[ing] the kind and quantity of goods and the price at which such goods shall be sold to the Indians' . . . [The

Commissioner does not have] unbridled discretion to refuse to regulate . . . ."); Standard Oil Co. of Cal. v. F.T.C., 596 F.2d 1381 (9th Cir. 1979), overruled on other grounds, ____ U.S. ____, 101 S.Ct. 488 (1980) (although the F.T.C.'s determination that it has reason to believe that the defendant has engaged in monopolistic practices is committed to the agency's discretion, 15 U.S.C. § 45(b) requires the F.T.C. to make such a determination before issuing an F.T.C. complaint); Abrams v. Hills, 547 F.2d 1062 (9th Cir. 1976), cert. dismissed, 439 U.S. 1001 (1978) (Congress did not intend to give the Secretary of Housing and Urban Development the discretion to decline to spend any of the money targeted for the operating subsidy program.) In short, we conclude that the VA's

refusal to assign and refund any VA-guaranteed loans in Los Angeles during the years 1974-76 was not in violation of any statutory duty created by § 1816(a).

V.

Constitutional Claim

The Ranks also claim that the VA deprived John Rank of his statutory entitlement to the benefits of the VA guaranty home loan program without affording him due process of law under the Fifth Amendment.

The Due Process Clause of the Fifth Amendment applies to actions of the federal government and not to individual activities of private actors. In order to apply the proscriptions of the Fifth Amendment to private actors "there must exist 'a sufficiently close nexus between

the [government] and the challenged action of the . . . [private] entity so that the action of the latter may be fairly treated as that of the [government] itself.'" Warren v. Government National Mortgage Ass'n, 611 F.2d 1229, 1232 (8th Cir. 1980), cert. denied, ____U.S.____, 101 S.Ct. 133 (1980), quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

In the present case, the alleged loss of the entitlement under the program was the direct result of foreclosure by the private lender under a valid contract between the appellees and the private lender, and cannot be attributed to the federal government. Although the private lender was subject to extensive federal regulation under the federal home loan guaranty program, this, alone, in our

view, is insufficient to convert the actions of the private lender into governmental action. See Fitzgerald v. Cleland, 498 F. Supp. 341, 349 (D. Maine, 1980), aff'd on other grounds, (1st Cir. 1981). Cf. Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 350-51 (public utility's termination of electric services does not implicate Due Process Clause of Fourteenth Amendment).[14] We thus conclude that foreclosure by a private lender of a mortgage in a federal mortgage guaranty program does not involve federal action sufficient to invoke the due process clause of the Fifth Amendment. See Warren v. Government National Mortgage Ass'n, supra; Roberts v. Cameron-Brown Co., 556 F.2d 356, 358-60 (5th Cir. 1977); Fitzgerald v. Cleland, supra, 495 F. Supp. at 348-49.

For the foregoing reasons, the district court's judgment is REVERSED.

FOOTNOTES

1/ Page 4 At the time plaintiffs received their loan, the amount was $12,500 rather than $27,500. 38 U.S.C. § 1810(c) (1970).

2/ Page 5 The VA also has a direct home loan program, 38 U.S.C. § 1811, and a mortgage insurance program, 38 U.S.C. § 1815. These programs are not involved in the present case, which arose under the loan guaranty program.

3/ Page 12 Cohen offered the Ranks the alternative of selling their house, obtaining a second mortgage, or making monthly payments equal to 1.5 times the regular monthly payments. The Ranks attempted unsuccessfully to obtain a second mortgage. They also tendered one month's payment to Kissell, plus a small additional amount, in late May 1975. Kissell declined to accept the payment, pointing to the Ranks' previous delinquencies and stating that "it is obvious that you cannot afford the property."

4/ Page 12 John Rank proposed that he pay $180 per month out of his $360 unemployment check (R. 112). The Ranks apparently never received a reply to this letter.

5/ Page 14 The fact stipulation filed below contained, aside from the details of the Ranks' particular case, a description of the operations at the Los Angeles VA Regional Office (R. 115-19). It was stipulated, inter alia, that the VA's Los Angeles employees spent most of their time servicing the VA's direct loans, not loans in the loan guaranty program; that the VA conducts supplemental servicing of guaranteed loans only when the veteran is in a solvent enough position that his default likely can be cured; that in 1974-76 the VA obtained no loans on assignment under 38 U.S.C. § 1816(a) and 38 C.F.R. 36.4318; that the Ranks did not know of the refunding option or that refunding had been denied; and that there are no regulations requiring that notice on refunding be given to borrowers like the Ranks.

6/ Page 17 The court crossed out the Ranks' proposed findings and conclusions on their alternative theory that the non-judicial foreclosure was unconstitutional. On appeal, the parties have been permitted to file supplemental briefs arguing the constitutional issue.

7/ Page 17 The district court's order was stayed pending the outcome of

this appeal. In the meantime, the Ranks continue to reside in the house that is the subject of this litigation.

8/ Page 18 In Cort v. Ash, the Court articulated four factors that inform the decision whether to imply a cause of action under a federal statute: whether the "statute create[s] a federal right in favor of the plaintiff"; whether there is "any indication of legislative intent . . . to create such a remedy"; whether implying a remedy is "consistent with the underlying purpose of the legislative scheme"; and whether the cause of action is "one traditionally relegated to state law." Cort v. Ash, supra, 422 U.S. at 78. See Glacier Park Foundation v. Watt, Nos. 81-3102, 81-3511, slip op. at 5998; Osborn American Ass'n of Retired Persons, No. 78-3744, slip op. at 5527-29 (9th Cir. Nov. 6, 1981).

9/ Page 20 In addition, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 19 (1979); see Northwest Airlines v. TWU, ____ U.S. ____, 49 U.S.L.W.

4383, 4388 n.30 (1981). In this case, the statute provides administrative remedies against private lenders for inadequate servicing. Section 1804(d) authorizes the VA to deny participation in the loan guaranty program to private lenders who fail to provide adequate servicing of VA-guaranteed loans, and section 1816(a) permits the VA to refund the unpaid balance of the borrower's loan obligation to the lender and receive an assignment of the loan and security from the lender.

10/ Page 25 There is also nothing in the record to suggest that the Ranks in any way relied to their detriment on VA Circular 26-75-8.

11/ Page 25 Thorpe v. Housing Authority, 393 U.S. 268 (1969), relied on by appellees, is distinguishable. In Thorpe, HUD issued a circular requiring local housing authorities to explain to tenants facing eviction from federally-funded housing the reasons for the eviction. The Court held that the circular, issued pursuant to HUD's rule-making power, was intended to have the force and effect of law. In Thorpe, however, the circular was to be incorporated into a HUD Manual containing implementing regulations that were, according to

HUD, "'the minimum considered consistent with fulfilling Federal responsibilities' under the Act." 393 U.S. at 275. The circular was thus distinguished from the various "handbooks" and "booklets" issued by HUD that contain mere "instructions," "technical suggestions," and "items of consideration." Id.

12/ Page 27 The legislative history of the Act, although generally unilluminating, suggests that Congress did not envision mandatory supplemental servicing by the VA. The loan guarantee program was originally conceived as a direct loan program administered by the VA to veterans. Because of congressional concern that such a program would require the creation of a huge, unwieldy bureaucracy, the loan guarantee provisions, designed to induce private lenders to make the loans to veterans, were substituted for the direct loan program. See, e.g., 90 Cong. Rec. 4654 (1944) (remarks of Rep. Jeffrey).

13/ Page 34 The dissent suggests that this construction deprives § 1816(a) of any meaning or purpose. We fail to understand, however, why it is meaningless to provide an administrative agency with a remedial tool that it may otherwise be powerless to employ. It

is possible, of course, as the dissent is apparently persuaded, that the assignment-refunding option of § 1816(a) would be more effective if the administrator were required to establish criteria and procedures for determining when refunding is warranted, or otherwise to establish an assignment-refunding "program." That judgment, however, is for the legislature, not the judiciary. Nothing in the statutory language or history of § 1816(a) indicates that Congress contemplated such requirements and we refuse to substitute our judgment for that of Congress.

Moreover, we are unable to discern what it is that the dissent would have the VA do. The dissent avoids any delineation of the "program" supposedly required by § 1816(a), no doubt because the statute and the legislative history are silent on the issue. Indeed, the dissent carefully specifies what it would not require of the VA and what it does not decide; yet it would give the VA no affirmative guidance beyond a vague admonition not to ignore the statute. We fail to understand what useful purpose would be served by such a standardless directive.

14/ Page 38 The Ranks contend that the VA is ultimately responsible for the loss of John Rank's statutory benefits because the VA had authority to avoid the foreclosure by refunding their loan. The VA's failure to exercise the assignment-refunding option of 38 U.S.C. § 1816(a) does not, however, give rise to a due process claim. We concluded above that § 1816(a) creates no judicially enforceable duty on the part of the VA; it follows that § 1816(a) creates no constitutionally protectable property interest, and that the VA's decision not to exercise the assignment-refunding option did not implicate John Rank's due process rights. See Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972); McCachren v. United States Dep't. of Agriculture, 599 F.2d 655, 656-57 (5th Cir. 1979); Simpson v. Cleland, supra, 640 F.2d at 1360.

Reinhardt, Jr., dissenting,

Rank v. Nimmo, No. 79-3128

I dissent from that part of the majority's opinion which treats the VA's refusal to exercise its discretion under section 1816(a).

The district court found that the VA refused to exercise section 1816(a) assignment authority during 1974-76 in the Los Angeles region and concluded that in so doing the VA had illegally failed to exercise its discretion. The majority does not dispute the factual finding. Yet it reverses the district court's conclusion of law and decides that the VA is merely "empower[ed]" to utilize assignment-refunding and is therefore free to ignore the existence of the statutory provision entirely, as the

district court found it did here. Under this construction of the statute, the Administrator can refuse to exercise any of the discretion given him by section 1816(a), without providing or, more important, having any reason for so doing. This interpretation is unsupported by precedent or the rules of statutory construction. Therefore, I would affirm that portion of the district court's judgment (1) finding that the VA's failure to take any action regarding VA guaranteed home loans under section 1816(a) constitues an illegal failure to exercise its discretion, and (2) requiring the VA to consider refunding and assignment of plaintiff's loan obligation.

The majority concludes that the VA has no statutory duty to implement the provisions of section 1816(a), but cites

no authority for its novel position. The opinion merely purports to distinguish three of our cases supporting a contrary view: Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971); Abrams v. Hills, 547 F.2d 1062 (9th Cir. 1976) cert. dismissed, 439 U.S. 1001 (1978); and Standard Oil Co. of California v. FTC, 596 F.2d 1381 (9th Cir. 1979) overruled on other grounds, 449 U.S. 232 (1980). In each of these cases we required an administrator to exercise discretion and implement the statutory authority. The majority distinguishes these cases by saying that the statutes there involved reflected a Congressional intent that some regulation occur.

The majority's rationale for distinguishing our applicable precedent is unpersuasive. The government, which suggested that rationale in its brief,

gleans a Congressional intent in Rockbridge from the unsurprising idea that the statute there construed was "passed with a specific set of legislative objectives in mind." I trust that neither the government nor the majority intends to imply that section 1816(a) was passed without any legislative objectives in mind. That proposition would violate the hornbook rule that statutes must be construed to have both meaning and purpose. In Professor Llewellyn's formulation: "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed, 3 Vand.

L. Rev. 395, 400 (1950). Making that assumption, the majority's suggestion appears to be that since section 1816(a) was incorporated in a statute which had only a general set of legislative objectives, Congress did not intend to require that the specific provision be implemented. Whatever may recommend this concept, the majority offers no reasoning or explanation in support of it.

In enacting section 1816(a) Congress quite sensibly refrained from instructing the VA as to the particular circumstances under which it should accept assignments of loans and refund them, preferring to leave these practical decisions to the discretion of the agency. The majority characterizes Congress' action as an "absence of any standards or procedures governing the administrator's exercise

of the assignment refunding option . . . ." Ante at ____, and then, relying on this supposed absence of standards, leaps to the conclusion that section 1816(a) need not be implemented. There is no precedent supporting this leap in logic; nor is there any basis for the majority's newly discovered principle of administrative law -- if standards are not set forth, the statute is lawful but the agency charged with its enforcement is free to ignore it.

The notion that Congress must or should state a standard, policy or principle in every regulatory statute is denied in the cases[1/] and by the commentators.[2/] Without an explicitly declared Congressional intent, a court should not announce an absence of any standards but should look to whatever intent may be

fairly inferred from the entire legislative scheme.[3/]

Here, it seems clear that Congress intended to grant veterans as much reasonable forebearance in servicing their loans as possible. Indeed, just a year after the 78th Congress created the loan guarantee program, the 79th Congress extensively expanded its scope by adding three new sections allowing different financing techniques to allow maximum forebearance. Act of December 28, 1945 ch. 588, § 8, 59 Stat. 623, 626 (1945) (current version in part at 38 U.S.C. § 1816 (1976)) (amending Serviceman's Readjustment Act of 1944, ch. 268, §§ 500-505, 58 Stat. 284 (1944)).[4/] These provisions, which include the precursor of section 1816(a), set out repurchase, refinancing and insurance techniques for

preserving veterans' titles to their homes. If Congress intended to provide reasonable forebearance to veteran borrowers, which it did, provided various financing techniques, which it did, it seems a reasonable inference that it intended the techniques to be used.[5/]

I cannot concur in the majority opinion for another reason. I simply cannot reconcile the majority's earlier conclusion that the VA's exercise of its discretion in "deciding" not to assign and refund appellee's home loan is not reviewable with its later conclusion that the VA is merely empowered, under the statute, to exercise discretion, is not required to do so, and that its failure to exercise any discretion at all was lawful. Throughout the earlier part of its analysis, the majority refers to the

VA's decision not to assign and refund appellees' loan. It holds, "We thus conclude that the VA's decision not to assign and refund appellees' home loan is not judicially reviewable." Ante at ____ (emphasis added). And yet in the next part of its analysis, it approves the VA's failure to make a decision as to appellees' loan, and as to all other loans, on the theory that the VA is merely empowered to exercise its discretion but need not actually do so.

Earlier, in dealing with the question whether the court may review a particular decision of the VA not to refinance a specific loan, the majority approves the following contention of the VA: "[T]he decision whether or not to employ the assignment-refunding option is 'committed to agency discretion' within

the meaning of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), and thus is not reviewable under that Act." Ante at ____. I agree.[6/] But implicit in the VA's (and the majority's) contention is the proposition that the agency must exercise the discretion which is committed to it. It must do so by making decisions as to whether or not to employ the assignment-refunding option. While we cannot review the agency's decisions after it makes them, we can and must review the agency's attempt to ignore its discretion and its failure to make any decisions at all.

The majority's analysis suffers from other internal inconsistencies. For example, the statement at footnote 9, where the majority relies on the section 1816(a) "remedy" to support the conclu-

sion that no private cause of action exists cannot be harmonized with the section of the opinion under discussion here. While I do not quarrel with the footnote 9 conclusion that Congress intended section 1816(a) to provide a remedy for veterans, I find it troublesome that the majority relies on the existence of that remedy as a basis for holding that veterans have no private right of action and then subsequently concludes that the VA may simply ignore the provision and, without any reason, deprive all veterans of this "remedy" entirely.

My conclusion is not that section 1816(a) assignments must be instituted once a month, once per thousand defaults or with any other particular frequency. Nor am I contending that we may review a

decision by the VA not to pay the holder of an obligation the unpaid balance in a particular case in which the VA has made the specific judgment not to do so. My conclusion is simply that the VA cannot ignore the statute.[7/]

Because the majority legitimizes the VA's neglect of its discretion, I dissent.

FOOTNOTES

1/ Page 52 In a different time, standardless Congressional delegations raised different issues. E.g., Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The unmistakable thrust of later cases is that standardless statutes are necessary to the conduct of government and that the judicial and executive branches "are and must be coordinate branches not only for carrying out policies determined by the legislative branch but also for determining basic policy." K. Davis, Administrative Law Text 30 (3d ed. 1972); See Fahey v. Mullonee, 332 U.S. 245 (1947).

As in Fahey, I would suggest that a standardless statute indicates a Congressional judgment that the relevant policy issue is sufficiently complex so as to preclude the statement of specific standards. That judgment does not mean that Congress has retained the policy judgment of whether to create a program. Rather, it means that the basic framework of a program is created and the job of formulating the complex policies necessary to operate the program is delegated to the administrative agency. This principle supports my conclusion that the VA Administrator "cannot ignore the statute," an idea which

the majority characterizes as a "vague admonition." Ante at n. 13. See text accompanying n. 8, post at ____.

Armed with the "vague admonition" that the Administrator must exercise the discretion vested in him by Congress, I believe the VA could properly perform its job of determining when the assignment and refunding of loans should be made.

2/ Page 52 E.g., 1 K. Davis Administrative Law Treatise § 3:5 (2d ed. 1978).

3/ Page 53 See Rockbridge v. Lincoln, 449 F.2d at 570-71.

"The Rule of Inferred Intent" assumes that every statute is logical and complete and that this completeness can provide appropriate meaning to unglossed terms. See Driedger, A New Approach to Statutory Interpretation, 29 Canadian Bar Review 838 (1951), reprinted in 4 Sutherland Statutory Construction 25, 26 (C. Sands ed.) (1975).

In Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), Justice Cardozo said: "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." Id. at 439. (Cardozo, J., dissenting) (citation omitted).

4/ Page 53 The act also liberalized the legislative scheme by extending the time for loan applications, and providing an automatic 50% guaranty of agreed on loans. See H. R. Rep. No. 1449, 79th Cong., 1st Sess. 602 (1945), reprinted in 1945 U.S. Code Cong. Serv. 935.

5/ Page 54 This inference finds support in the statutory requirement that a lender notify the Administrator thirty days prior to suit or foreclosure. Section 1816(a) provides in part:

> Before suit or foreclosure the holder of the obligation shall notify the Administrator of the default, and within thirty days thereafter the Administrator may, at the Administrator's option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security.

Thus in every case of potential default, a lender must send notice to the VA. There is nothing precatory about that. I find the fact that the notification requirement appears in the same sentence of § 1816(a) as does the assignment-refunding authority to be significant. It is clear that Congress required such notifications so that the VA could consider them in determinating whether to enter into particular loan assignments. If Congress had

thought the VA could simply ignore the provisions of § 1816(a), as the majority suggests, it would hardly have bothered to require all lenders to send the foreclosure notices in every case. Put affirmatively, since Congress required this information to be conveyed to the VA in all cases, it must at least have intended the VA to consider whether to assign and refund veteran's obligations in some cases.

6/ Page 56 It is clear that the VA and the majority are referring to the decision whether to employ the option in a particular case, and not the decision whether to recognize the assignment-refunding option at all. Shortly after it quotes the VA's contention, the majority says "Neither the statute nor the formal regulations published pursuant to 5 U.S.C. § 553 provide any legal standards by which a decision to assign and refund could be reviewed ...." Ante at ____ (emphasis added). Similarly in describing the discretion given to the VA, the majority says

> The decision to accept an assignment of a veteran's loan necessarily involves a consideration of myriad factors, including, but not limited to, internal VA management considerations relating to budget and personnel, the risk of loss to the VA, the adequacy of prior loan servicing, and the circumstances of the borrower's default. The

application of these factors, as well as the determination of other relevant factors and the weight to be attributed to each, has been entrusted to the unfettered discretion of the VA. Even if legal standards for review could be divined, it is clear that, absent allegations that the agency has improperly considered factors outside those entrusted to its discretion, the decision whether to assign and refund raises issues not well-suited for determination by the courts.

Ante at ____.

Thus both the majority and the VA recognize that Congress afforded the VA the discretion to make specific decisions and that it is the actual exercise of this discretion which is not subject to judicial review.

7/ Page 58 To reach the conclusion I reach here, it is not necessary to decide the question whether the VA could make a deliberate reasoned decision not to implement the assignment-refunding program, although I believe it could not. Nor need we decide whether the VA could suspend implementation of the program for a particular period if it concluded that it had valid reasons for doing so. In this case the record reveals no decision of

of any kind by the VA, and certainly no decision by the VA to refuse to utilize the assignment-refunding program. Thus, in view of the district court's finding, I can only conclude that the VA simply ignored the law.

D-0543A A0100#2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN and DOLORES RANK, Plaintiffs-Appellees, v. ROBERT P. NIMMO*, Administrator of the VETERANS ADMINISTRATION, et al., Defendants-Appellants.	No. 79-3128
JOHN and DOLORES RANK, Plaintiffs-Appellees, v. ROBERT P. NIMMO*, Administrator of the VETERANS ADMINISTRATION, et al., Defendants, and THE KISSELL COMPANY, an Ohio corporation, Defendants-Appellants.	No. 79-3205 O R D E R

*We substitute the name Robert P. Nimmo, the successor in July 1981 to the original defendant, Max Cleland, pursuant to Fed. R. App. P. 43.

Before: WALLACE, NORRIS and REINHARDT, Circuit Judges.

The panel as constituted in the above cases have voted as follows: Judges Wallace and Norris voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc; Judge Reinhardt voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

The opinion in the above entitled case is ordered amended as follows:

(1) At page 905, first column, line 27:

After the sentence ending "of the Administrator," delete "Thus," and insert:

> "[W]here the duty to act turns on matters of highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the respon-

sibility for decision." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1957) (citations omitted). We thus conclude that . . ."

(2) At page 905, footnote 13, last sentence of first paragraph:

Delete the words "and we refuse to substitute our judgment for that of Congress." Insert the following:

On the contrary, the legislative history suggests that Congress may originally have intended that § 1816(a) be used simply as an alternate method of foreclosure. The House Report accompanying the 1945 amendments to the VA Act

states that, under § 1816 (a), the "Administrator may, at his option, pay the lender the unpaid balance of the loan plus accrued interest and receive an assignment of the loan and security and thereafter sue or foreclose in the name of the Veterans Administration." H.R. Rep. No. 926, 79th Cong., 1st Sess. 4 (1945) (emphasis added). We should be hesitant to read into the statute a requirement that the VA implement an assignment-refunding "program," when it is not even clear that Congress

contemplated that § 1816(a) would be used for the purpose of refinancing a veteran's loan.

The dissenting opinion is hereby amended as follows:

(1) At page 907, first column, first sentence of the second paragraph after the word "cites," delete from "no authority" through "contrary view:" and substitute the following:

only a dictum from Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1957), in support of its novel position.

That authority is not persuasive here. So far as I can determine, Mr. Justice Douglas' dictum

has never been cited by any federal court. Moreover, the case itself has never been cited, nor relied on, by the Supreme Court in any of the dozens of later cases treating the reviewability of an agency's action or inaction.

In other cases raising the question whether "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2) (1976), current law requires a reviewing court "to determine 'whether nonreviewability can fairly be inferred.'" Morris v. Gressette, 432 U.S. 491, 501 (1977),

quoting Barlow v. Collins, 397 U.S. 159, 166 (1970). This test is not similar or even related to the standard suggested by the majority. Nor is it qualified by any references to "large or loose statutory terms." Panama Canal Co., 356 U.S. at 318. Moreover, although Panama Canal Co. has not been formally overruled, its usefulness for any purpose is doubtful. As the Fifth Circuit stated in Chevron Oil Co. v. Andrus, 588 F.2d 1383, 1391, n.14 (5th Cir. 1979), "[T]he continued vitality

of the Panama Canal Co. case as precedent is questionable."

The majority's treatment of our Circuit's precedent is equally unsatisfactory. It merely purports to distinguish three cases supporting a view contrary to its own:

(2) At page 909 at the end of footnote 5, add a new paragraph:

For its contrary conclusion, the majority quotes language in H.R. Rep. No. 926, 79th Cong., 1st Sess. 4 (1945). The majority relies on an emphasized clause of the quoted language for the proposition that Congress

may not have intended that section 1816(a) be used for the purpose of refinancing a veteran's loan. The majority errs in relying on the emphasized clause. The clause is taken verbatim from an amendment first proposed in the House bill, but subsequently removed from the bill by the Conference Committee. See 59 Stat. 623, 630 (1945). The language relied on by the majority is therefore entirely unpersuasive if not irrelevant on the question whether Congress intended that the VA

exercise the section 1816(a) authority granted it by the Act.

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN and DOLORES RANK, etc.,	CIV. NO. 76-3265-LEW
Plaintiffs,	JUDGMENT (Local Rule 3G)
vs.	
MAX CLELAND, etc., et al.,	
Defendants.	

Plaintiffs' Motion for Summary Judgment having been argued before the Court on ~~November 28, 1977~~ December 7, 1978, plaintiffs appearing by and through counsel Richard A. Paez and Richard A. Rothschild, federal defendants appearing by and through Barry J. Trilling, Assistant U.S. Attorney, and the non-federal defendant appearing by and through counsel Franklin K. Lane; the matter having been submitted for decision; and the Court having made findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED:

1. Plaintiffs' Motion for Summary Judgment is granted;

2. This Court has jurisdiction over all defendants and over the subject matter of the Complaint;

3. Judgment shall be entered on behalf of plaintiffs and against defendants with plaintiffs JOHN and DOLORES RANK having relief as follows:

a. It is declared that 38 U.S.C. § 1804(a) and the foreclosure avoidance rules, as set forth in VA Pamphlet 26-7, Department of Veterans' Benefits Circular 26-75-8 and internal VA Manuals impose mandatory legal and equitable duties on both private lenders and the Veterans' Administration to take all reasonable measures to avoid foreclosure of VA guaranteed home loans. The mandatory duty imposed by the foreclosure avoidance rules may be enforced by a veteran

borrower in a civil action.

b. It is further declared that the actions of the federal defendants and non-federal defendants with respect to the servicing of plaintiffs' VA guaranteed home loan were violative of the legal and equitable duties imposed upon them by the foreclosure avoidance rules.

c. It is further declared that the actions of the federal defendants in failing to accept any assignments of VA guaranteed home loans under 38 U.S.C. § 1816(a) and 38 C.F.R. § 36.4318 constitutes an illegal failure to

exercise discretion.

d. It is further declared that VA's refusal to accept an assignment of plaintiff's VA guaranteed home loan and its failure to provide written reasons for said refusal to do so constitutes an abuse of discretion under the Administrative Procedures Act.

~~e. It is further declared~~ that the use of non-judicial foreclosure to sell plaintiffs' home constituted a violation of the Fifth Amendment to the United States Constitution because ~~plaintiffs were deprived~~

~~of their property~~ interest in their home, pursuant to federal action, without the procedural safeguards required by the Fifth ~~Amendment.~~

~~f. It is further declared~~ that the actions of the federal defendants in terminating plaintiff JOHN RANK's VA housing benefits were violative of the Fifth Amendment because he was deprived of his VA statutory housing benefits, a constitutionally protected property ~~interest, without a~~

~~prior Goldberg~~ evidentiary hearing.

g. It is further declared that the Trustee's Deed, conveying title to the federal defendants is hereby cancelled and is therefore void having no force or effect in law.

4. IT IS ORDERED that federal defendants reconvey title in the subject property to plaintiffs JOHN and DOLORES RANK.

5. IT IS FURTHER ORDERED that defendant KISSELL reinstate plaintiffs' Deed of Trust, and Trust Deed Note;

6. IT IS FURTHER ORDERED that federal defendants reconsider whether refunding and assignment of plaintiffs' loan obligation is proper under 38 U.S.C.

§ 1816(a) and 38 C.F.R. § 36.4318. In the event that federal defendants decline to assign plaintiffs' loan obligation under 38 U.S.C. § 1816(a) and 38 C.F.R. § 36.4318, it is further ordered that federal defendants provide written reasons for said refusal;

~~7. The Federal and non-Federal~~ defendants are permanently enjoined from utilizing the non-judicial foreclosure procedure authorized by California Civil Code § 2924 to foreclose on plaintiffs' VA guaranteed home loan. The federal defendants are further enjoined from terminating plaintiff JOHN RANK's VA housing benefits without first affording him an evidentiary hearing wherein he can contest the VA's adverse decision including the ~~decision not to accept an assignment of~~

~~plaintiffs' loan obligation~~.

8. Plaintiffs are awarded their costs of suit in the amount of _____.

9. This Court shall retain jurisdiction of this matter until such time as defendants have fully complied with Paragraphs 4, 5 and 6 of this Judgment.

10. There is no just reason to delay entry of this Judgment against the defendants and it is hereby ordered that it be so entered.

DATED: 2 Oct., 1978 /s/

/s/
LAUGHLIN E. WATERS
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN and DOLORES RANK, etc.,	)	CIV. NO. 76-3265-LEW
Plaintiffs,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)	
MAX CLELAND, etc., et al.,	)	[LOCAL RULE 3G]
Defendants.	)	

FINDINGS OF FACT

The material facts in this case are not in dispute, and have for the most part been agreed to by all parties to this action.

1. John and Dolores Rank, husband and wife, and plaintiffs in this action (hereafter Ranks), live with their two adopted children in a two-bedroom house at 1585 Jess Street, Pomona, California, the property which is the subject matter of this action. John Rank is a veteran of the United States Army, and therefore is entitled to the benefits of the Veterans' Housing program established under the Veterans Benefits Act of 1958, 38 U.S.C. §§ 1801 et seq.

2. The defendants in this action are Max Cleland, Administrator of Veterans Affairs; John Miller, Director

of the Los Angeles Regional Office of the Veterans Administration. The Veterans Administration and The Kissell Company, an Ohio Corporation.

3. On or about January 20, 1971, the Ranks bought the house at 1585 Jess Street for $16,950. The purchase price was financed by a $16,950 loan from Trinity Mortgage Company, Inc. The loan was secured by a Deed of Trust and Trust Deed Note and was guaranteed by the Veterans Administration (VA) pursuant to the Veterans' Housing Program. Under the loan agreement, the Ranks were to make monthly payments of $148.00 to Trinity Mortgage Company.

4. Sometime in 1972, Trinity Mortgage Co. assigned its rights under the Deed of Trust to MacMillan Mortgage Co. In late 1972 and throughout part of

1973, the Ranks fell behind in their Deed of Trust payments. However, plaintiffs eventually were able to cure their delinquencies.

5. The MacMillan Mortgage Co. assigned its rights under the Deed of Trust to The Kissell Company, the non-federal defendant in this case. Through much of 1974, the Ranks encountered difficulties in making timely monthly payments, but they were able to make all of the 1974 monthly payments.

6. On November 12, 1973, The Kissell Company assigned and transferred to Government National Mortgage Association (GNMA) all interests and rights under the Deed of Trust and Trust Deed Note. Thereafter, The Kissell Company became the Servicer for GNMA of the Deed of Trust and Trust Deed Note.

7. On December 20, 1974, because of the economic recession of that period, John Rank was laid off from his job as a welder for Freight Liner Corp. in Chino, California, where he was earning about $900.00 per month. With the exception of a two-month job in July and August of 1975, John Rank was unable to secure steady employment until February, 1976. Dolores Rank was unable to work during that period because she was taking care of the Ranks' two adopted children.

8. From January to July, 1975 and from mid-September to February, 1976, Mr. Rank received $360.00 per month in unemployment insurance benefits.

~~9. The Ranks made the December, 1974 house payment. However, after doing so, they were informed by The Kissell~~

~~Company (Kissell) that there was a shortage of $50.82 in the Ranks' impound account. The shortage was not explained to the Ranks.~~

10. From February through April, 1975, the Ranks attempted to contact Kissell Co. in Los Angeles by phone, but Kissell did not return any of their calls. On April 10, 1975, Kissell sent to VA a Notice of Default, stating, "The borrowers have made very little effort to respond to any of our collection attempts. We are scheduling a field visit to determine their ability to reinstate."

11. On April 16, 1975, the Ranks successfully contacted The Kissell Co. and made an appointment to see Mr. Cohen.

12. One week later, the Ranks met with C. B. Cohen of Kissell. The discussion at the meeting centered around the impound account problem and John Rank's inability to make his monthly payments because of his unemployment. ~~Mr. Cohen told the Ranks that there was nothing that Kissell could do for them.~~

13. The Ranks next turned to the Valley Association of Cities (VAC), an organization which helped home owners with mortgage payment problems. VAC helped arrange another meeting of the Ranks and Cohen on May 7, 1975.

14. At the meeting, Cohen arrived at the conclusion that the Rank family expenses exceeded family income. In reaching this conclusion, however, Cohen counted as monthly expenses

certain purchases, such as clothing, that the Ranks considered to be occasional expenses that could be forgone for long periods of time.

15. Also at the meeting, Cohen offered the Ranks the alternatives of selling their house, obtaining a second mortgage, or making payments equal to 1.5 times the regular monthly payments. The Ranks subsequently went to apply for a second mortgage at Aames Home Loan Co. and were turned down because, they were told, Aames was not loaning money in Pomona.

16. On May 13, 1975, the VA sent to John Rank its form letter that followed a lender's Notice of Default. The letter suggested that Rank contact Kissell as soon as possible.

17. Subsequently, a representative from VAC called VA to inquire whether VA could help the Ranks. The representative was informed that unless the Ranks felt that they were being treated unfairly, little could be done.

18. On May 21, 1975, John Rank sent to Kissell money orders for a one-month payment of $148.00, $5.92 late charges, and $58.82 payment for the alleged impound account shortage. In an accompanying letter, he offered to begin making regular monthly payments from that day on, with the understanding that the existing delinquency would be cured at the earliest possible time. The letter stated that Rank was looking for employment.

19. On the same day, in response to the form letter from VA, Rank also wrote to the VA, enclosing a copy of his letter

to Kissell. In the letter to the VA, he reported his unemployment, discussed the impound account problem, and discussed his efforts to remedy the delinquency.

20. On May 23, 1975, Russell G. Meyer of Kissell, returned the two money orders along with a reply letter to the Ranks' proposal for curing the delinquency. Meyer stated that Rank's proposal for payment was unacceptable because, based on the earlier meeting with the Ranks, Kissell had concluded that the Ranks spent $149.00 more per month than they took in. He also mentioned a previous record of delinquencies, and stated: "[I]t is obvious you cannot afford this property."

21. On May 29, 1975, VAC called VA on behalf of the Ranks. Lynn Engles, a VA supervisor, took the call and in turn

spoke with Cohen of Kissell who told her that the Ranks' plan was too nebulous to satisfy Kissell, and that if they came up with something more substantial, he would reconsider. Subsequently, VAC spoke directly with Cohen, who suggested that something be put in writing.

22. On June 9, 1975, John Rank wrote to Kissell, proposing a payment of $180.00 per month from his unemployment insurance of $360.00 per month. He mentioned that if this proposal were accepted, his food stamp costs would go down, and also stated that he was trying to work out a deferred payment plan with his utility companies. The Ranks never received a reply to this letter.

23. In July, 1975, John Rank obtained his only steady employment of that year. He worked as a welder at

Randy Enterprises in La Habra until he was laid off on September 17, 1975.

24. On July 28, 1975, VAC sent a letter to various Kissell offices, with a copy supplied to VA. The letter summarized what had happened to date, complaining that VAC had never gotten a satisfactory answer to its inquiries and that no reply had been sent to the Ranks' letter of June 9th.

25. This letter was answered by Kissell's Western Regional Manager, Russell G. Meyer, on August 7, 1975. Meyer denied that the Ranks had been in contact with Kissell since February, stating that the first communication had been made on April 16th. He summarized the May 7th meeting between the Ranks and Cohen by concluding that the Ranks were spending $149.00 more per month than they

were receiving. He acknowledged John Rank's May 21st letter, but stated Kissell had no record of receiving the June 9th letter. He also asserted that Kissell had had only one contact with VAC, that on June 4th. After discussing the Rank's previous payment record, Meyer concluded by contending that Kissell had demonstrated its forebearance in this case by withholding foreclosure action for as long as it had.

26. On September 22, 1975, Kissell sent to VA a Notice of Intention to Foreclose, stating "The borrower was laid off work for eight months and had just stated that he started back to work. His income is less than his expenses. The borrower has been in touch with the branch, but no arrangements can be made due to the borrowers' financial problems.

We recommend foreclosure."

27. On September 23, 1975, Kissell informed the Ranks by letter of the company's intention to foreclose.

28. John Rank called the VA on October 9, 1975, and spoke with Frank Schiada, Rank's Loan Service Representative. Rank told Schiada he was unemployed and doing odd jobs on the side. He said he was willing to pay $180.00 per month to cure his delinquency, but Kissell was not being cooperative. Schiada told Rank that there was nothing VA could do for him.

29. On October 2, 1975, and October 9, 1975, John Rank made calls to Kissell's Ohio office, and was told that his $180.00 per month payment plan was unrealistic, and that he should deal with Mr. Meyer in the Los Angeles office.

30. Subsequently, VA sent to John Rank its form letter that follows the receipt of a Notice of Intent to Foreclose. The letter notified Rank of the impending foreclosure, reminded him that he was in danger of losing his property and incuring a debt to the government, and urged him to contact his mortgage holder.

31. On November 14, 1975, Henry Villa, the Rank family lawyer in Ohio, wrote to Kissell on behalf of John Rank. He informed Kissell of possible money in John Rank's mother's estate and assured the company that Rank would take care of his debts. No reply to this letter was ever received.

32. On Decemeber 23, 1975, Kissell filed an official Notice of Default of Property pursuant to California Code of Civil Procedure Section 2924.

33. In February, John Rank obtained a welding job at Gem Steel Co. in San Dimas. He continued at this job until July, when he was rehired at Freightliner Corporation after his 18 months layoff there. Rank has worked continuously at the Freightliner job since then.

34. On February 10, 1976, Rank went to the Kissell office in Los Angeles. He told Kissell he was back at work, gave Kissell a proposed budget, and offered to pay $220.00 per month. ~~Kissell promised to reply in writing~~.

35. On February 25, 1975, Rank called Kissell and was told that his offer was refused because VA would not allow Kissell to grant forebearance to a borrower more than four months in default.

36. On April 29, 1976, the property at 1585 Jess Street was sold at a non-

judicial trustee's sale. Less than one month later, Kissell transferred the grant deed on the subject property to VA.

37. As of January 1, 1975, there were some 471,365 outstanding home loans in the area served by the Los Angeles VA Regional Office (LAVARO) guaranteed by the VA. An estimated 259,250 of these were for homes in Los Angeles County.

38. In 1974, for the area served by LAVARO, 21,565 defaults were reported on loans guaranteed by the VA and there were 2,682 foreclosures. In 1975, 22,370 defaults were reported and 2,191 loans were foreclosed. In 1976, the figures were 20,080 and 1,308 respectively.

39. The persons in LAVARO primarily responsible for serving veteran home owners are Loan Service Representatives. LAVARO employed 14 Loan Service Representa-

tives as of January 1, 1975, 16 as of July 1, 1975, 19 as of January 1, 1976, and 22 as of July 1, 1976.

40. During the 1974 to 1975 period many of the Loan Service Representatives spent the bulk of their time servicing loans in the VA Portfolio Program, a direct loan program, rather than on the home loan guarantee program. However, several persons were hired to work exclusively on guaranteed loans.

41. In addition to the Loan Service Representatives, veteran home owners with VA-guaranteed home loans were also served by two Technical Unit Supervisors, the Chief of Loan Service Claims and the Assistant Chief, Loan Service Claims.

42. The Loan Service Representative and the supervisors named in Par. 41 above are the only persons in LAVARO

responsible for assisting veterans with VA-guaranteed home loans.

43. The only method by which VA can tell whether a servicer of a VA guaranteed home loan has performed an adequate job of servicing a particular loan in default is by examining the servicer's summaries of its loan servicing accompanying the servicer's Notice of Default and Notice of Intent to Foreclose.

44. During the time that Frank Schiada was the Loan Service Representative for the Ranks, the Loan Service Representative did not generally see the Notice of Default. It was read and filed by a clerk, who sent out a form letter to the borrower under the signature of the Loan Service Representative. The clerk would only show the Notice of Default to a Loan Service Representative if something

unusual appeared on the face of the Notice, such as an untimely filing of the Notice of Default or an abandonment of property.

45. During the same period, when the VA received a Notice of Intent to Foreclose, a clerk would routinely reply through a form letter under the signature of a Loan Service Representative, but the Loan Service Representative would also review the file.

46. From 1974 to 1975, LAVARO never rejected a servicer's Notice of Default on grounds that servicing had been inadequate.

47. From 1974 through 1976, VA never suspended a servicer of VA guaranteed home loans because of the servicer's record of inadequate loan servicing.

48. VA does not send questionnaires to its servicers of VA guaranteed home loans regarding their servicing policies.

49. No training sessions are held by LAVARO to teach servicers how to comply with the VA Lenders' Handbook and other VA circulars regarding servicing.

50. The VA has never undertaken any study or report on the causes or reasons for default by veterans on home loans guaranteed by VA.

51. LAVARO has no educational programs for lenders and servicers on proper servicing policies.

52. In compliance with VA Manual M 26-1, Change 31, p. 37, ¶ C3, which calls for a "brief narrative statement in respect to the servicing policy of the lender and its facilities for servicing loans," the only statement Kissell sent

to VA was a 1965 summary of its facilities for servicing, which did not discuss servicing policy.

53. It is the policy of LAVARO that its employees should conduct supplemental servicing only when it is likely to affect a meaningful result, i.e., when the veteran has funds sufficient to cure his or her delinquency.

54. The "Loan Service Report" (VA Form 26-6808), a comprehensive report by the Loan Service Representative of the salient facts of a default, was not utilized with respect to plaintiffs John and Dolores Rank.

55. 38 C.F.R. § 36.4318 provides that upon receiving a Notice of Default or a Claim for a Guarantee or a Notice of Intention to Foreclose, the Administrator of the VA may require the holder

of a mortgage to assign the loan to the VA. In the years 1974, 1975, and 1976, no loans were assigned to VA pursuant to Section 36.4318.

~~56. A veteran falling behind on his or her VA guaranteed home loan payment is not informed by LAVARO of the possibility that the loan may be assigned to VA.~~

57. The applicable criteria for determining whether or not a loan is to be assigned to VA pursuant to 38 C.F.R. § 36.4318 is set forth in VA Manual M 26-3, ¶ 2.39.

58. The Ranks were never informed of the availability of refunding/assignment under 38 C.F.R. § 36.4318; nor were they informed of the applicable criteria for determining whether their loan was to be refunded under 38 C.F.R. § 36.4318.

59. The Ranks were never informed of the LAVARO's adverse decision not to refund and assign their loan under 38 C.F.R. § 36.4318.

60. In deciding against refunding, the Ranks' loan under 38 C.F.R. § 4318 the loan service representative who made the decision did not prepare a written statement as to why the Ranks did not meet the applicable criteria set forth in VA Manual M 26-3, ¶ 2.39, sub-section (d) and (d.1).

61. A lender or servicer of a VA guaranteed home loan is never prohibited by VA from accepting a repayment plan or granting some other form of forebearance to a borrower.

62. Lenders participating in the VA home loan guarantee program often receive "discount points". Under the discount

point system, a lender will charge the seller of property a percentage of the total amount of the loan that the lender will make to the buyer of the property. This charge is designed to compensate the lender for often receiving lower interest rates for a VA guaranteed home loan than the lender would have received for a conventional loan.

63. Every lender participating in the VA home loan guarantee program is mailed a Lenders' Handbook, and every lender in the region served by LAVARO was mailed a copy of VA's Circular 26-75-8.

64. All of the VA guaranteed home loans in Los Angeles County involved the use of a deed of trust form that included a provision authorizing non-judicial sale pursuant to California Civil Code Section 2924.

65. In 1971, all VA guaranteed home loans in Los Angeles County involved the use of VA form 26-6303 (Home Loan) Rev. June 1963, entitled "Deed of Trust With Assignment of Rents". However, the use of form 26-6303 was considered optional by VA.

~~66. When John Rank purchased his~~ present home on 1585 Jess Street in Pomona, no one explained to him the significance of the power of sale provision in the deed of trust or that his home could be sold without a judicial hearing in order to satisfy the loan ~~obligation.~~

CONCLUSIONS OF LAW

From the above Findings of Fact, the Court makes the following Conclusions of Law.

1. Jurisdiction lies in this Court under the following statutory provisions: 28 U.S.C. § 1331(a) (federal question); 28 U.S.C. § 1361 (mandamus); ~~28 U.S.C. § 1535 (commerce clause); and 28 U.S.C. § 1345(f) (title dispute).~~ See 24 Stat. 9 38 C.F.R. § 36.4300 et seq. impliedly

2. 38 U.S.C. § 1801(a) requires that VA guaranteed home loans be adequately serviced by the Veterans Administration and private lenders.

3. Implementing § 1804(d) VA Pamphlet 26-7 (the VA Lenders' Handbook), Department of Veterans' Benefits Circular 26-75-9 and internal VA manuals impliedly require mandate that VA and private lenders must take all reasonable measures to avoid foreclosure.

4. The foreclosure avoidance rules impose mandatory duties on both private lenders and the Veterans Administration.

5. The foreclosure avoidance rules are binding on both the Veterans Administration and private lenders notwithstanding the fact that they were not published in the Federal Register pursuant to the Administrative Procedures Act, 5 U.S.C. § 553.

6. The rules regarding servicing must be followed because they constitute the only difinitive interpretation of the statutory requirement of adequate loan servicing.

7. Veteran borrowers may maintain civil actions against private lenders and VA charging violation of statutory servicing requirements.

8. Veteran borrowers may enforce the servicing requirements as third party beneficiaries of loan guarantee agreements between VA and private lenders.

9. The servicing requirements of the Handbook, the Circular, and internal VA manuals impose an equitable duty on lenders and VA that can be enforced in an action to set aside a foreclosure.

10. VA and defendant The Kissell Company each violated their statutory duty to take reasonable measures to avoid foreclosure of plaintiffs' VA guaranteed home loan.

11. Under 38 U.S.C. § 1816(a), when a veteran borrower is in default on his VA guaranteed home loan, the VA may refund to the lender the unpaid balance of the obligation and receive an assignment of the loan and security. VA is then in a position to grant forebearance to the borrower.

12. From 1974 through 1976 - during which time plaintiffs' home loan was

foreclosed - VA refused to implement the assignment program in the Los Angeles region. This refusal constituted an illegal failure to exercise discretion.

13. VA's refusal to assign plaintiffs' loan was an abuse of discretion under the Administrative Procedures Act because plaintiffs clearly met VA's own criteria for assignment set out in VA Manual M 26-3, Change 32, ¶ 2.39(d), p. 42.

14. VA's refusal to assign plaintiffs' loan constituted an abuse of discretion because VA refused to supply reasons for its refusal.

~~15. The use of a non judicial~~ foreclosure procedure to deprive plaintiffs of the possessory interest in their home was governmental action ~~reviewable under the Fifth Amendment~~

~~because of the extensive involvement of~~ VA in every action of Kissell Co. in initiating, servicing and foreclosing plaintiffs' VA home loan. Federal action is also present in this case as a result of the direct governmental involvement of the Government National Mortgage Association, an agency of the United States Department of Housing and Urban Development, at the time of foreclosure. (12 U.S.C. §§ 1716, 1723, and 1723(a)(d)(1).)

16. Plaintiffs' possessory interest in their home cannot be abridged without due process of law.

17. The use of non-judicial foreclosure proceedings denied plaintiffs due process of law because it takes their property interest without affording them ~~a meaningful opportunity to be heard~~.

~~18. Plaintiffs did not waive their~~ right to due process of law by executing a deed of trust containing a power of sale clause or by any other action.

19. Plaintiff John Rank's statutory entitlement to veterans' housing benefits under 38 U.S.C. § 1801 et seq. constitutes a property interest which may not be adversely affected without due process of law, as required by the Fifth Amendment. Due process, in the context of this case, can only be satisfied by affording plaintiff John Rank notice of his rights and a prior evidentiary hearing before his statutory housing benefits are terminated.

20. Plaintiff John Rank was denied due process of law because his VA housing benefits were terminated without affording him notice that 1) failure to cure

~~his default would result in loss of his~~ VA housing benefits; 2) of the availability of assignment under 38 U.S.C. § 1816(a) and 38 C.F.R. § 36.4318; 3) whether the VA has refused to accept an assignment of the loan obligation and if so, the reasons therefore; and 4) his right to an evidentiary hearing. Plaintiff John Rank was also denied due process of law because his veterans' housing benefits were terminated without affording him a prior evidentiary hearing wherein he could contest the VA's decision to terminate his housing benefits and to challenge the refusal of the VA to accept an assignment of his home loan ~~under § 38 U.S.C. § 1816(a).~~

DATED: 3 July, 1973 /s/

/s/
LAUGHLIN WATERS
U.S. District Judge

2.39 REFUNDING UNDER VA REGULATION 4318

a. Review of Cases Destined for Foreclosure. Depending upon the circumstances in each case where the present holder has refused further forbearance and reasonable efforts to obtain refinancing by another lender or to cure the default have failed and foreclosure is impending, one of three objectives may be attained by applying the provisions of VA Regulation 4318 to refund the guaranteed or insured loans: (1) Liquidation of the loan, by the VA at a minimum of expense, (2) avoiding the liquidation of the loan, and thereby assisting a worthy veteran to retain his property, with the VA in no worse position by reason of the refunding, or (3) avoiding liquidation of the loan and the acquisition of the property in any case where it would be to the interests

of the Government to do so, irrespective of whether the homeowner is the original veteran or a transferee. In general, but excepting those cases where it is obvious from information in the loan docket that other action is more desirable, every guaranteed or insured loan which is destined for foreclosure will be reviewed for possible refunding by the VA, and the loan docket will reflect the decision whether negative or otherwise.

(1) Refunding for Veteran's Transferee. In any case where the present owner of the property is the original veteran-obligor's immediate or remote transferee, a refunding of the loan will require that the interests of the Government will be

served best thereby. Since the property is no longer owned by the original veteran, certain of the equitable considerations in retaining the property for the veteran no longer exist. Therefore, the benefits to such transferee, which may be derived through a refunding by the VA of his defaulted loan, will be afforded to the extent of adequate and proper loan servicing or where the refunding may minimize, or altogether avoid, an indicated loss which might otherwise be suffered by the Government.

NOTE: Refunding for veteran's transferee will be limited to those cases where it is indicated that a potential loss through acquisition and resale of the property can be avoided or minimized by such action. The considerations normally afforded to veteran-borrowers under subparagraph d below will not be for application where the original veteran-borrower is no longer the property owner.

b. Prompt Action Required. According to the provisions of VA Regulation 4318 the holder must be notified of any decision to refund the loan within 30 days of the receipt of notice of default or claim for

the guaranty, or notice of intention to foreclose. Otherwise the holder may proceed as intended, and prompt action is therefore required by the VA. However, it is usually possible to arrange with the holder for a postponement of legal action pending VA consideration of such refunding, and this will be done whenever necessary or advisable. The decision to refund a guaranteed or insured loan in order to accomplish any of the three objectives listed in subparagraph a hereof may be made without Central Office approval. [except in those cases where refunding is contemplated to afford the borrower relief as a "distressed mortgagor" as defined in section 1012 of Public Law 89-754. (See par. 2.35b(5) above.)]

c. Refunding for Liquidation. The provisions of VA Regulation 4318 may be

employed in any case where it appears that a substantial saving of foreclosure costs may be effected, or that other substantial advantage may accrue to the Government thereby. Ordinarily such action will be taken only in the extremely rare case where, because of circumstances beyond the control of the VA, no reasonable limitation could be imposed on the expense of liquidation. This action would be in the nature of a "salvage" operation in order to realize that maximum advantage for the Government -- financial or otherwise. Since liquidation by the VA is intended, no acquired loan account will be established for subsequent loan servicing. (See also M[26-4], par. 2.12 c and d.)

d. Refunding To Avoid Liquidation. A decision to refund will require due consideration for all pertinent factors,

including (but not limited to) the facts developed through loan servicing by the holder and the VA, the current reasonable value of the property, the amount delinquent, the unpaid balance of the indebtedness, and the borrower's present and potential ability to pay. It should be established beyond reasonable doubt that:

(1) The refunding will be in the best interests of the VA.

(2) The default was not willful.

(3) The borrower is desirous of retaining his property.

(4) The borrower is deserving of VA assistance.

d.1 Special Cases. There will be cases which do not meet all the criteria specified above, but which should be refunded because it would be to the best interests of the Government to avoid

acquisition of the properties. These would include cases in projects or areas where the VA already owns a number of properties and the sales market is inactive, or it is anticipated that particular property, whether the property is located in a project or not, would be difficult to sell or would be saleable only for an amount substantially below VA's investment. In such cases, even though the payment record of the owner would not warrant indulgence, it may be in the interests of the Government to refund the loan provided there is some likelihood that the loan payments will be made by the borrower. In this connection an extension and reamortization of the loan may be warranted. (See subpar. g(2) below.) In all cases involving properties of the kind described herein, thorough consideration should be given to the possibility or refunding.

SUMMARY OF BASIS FOR LIQUIDATION PROCEDURE

NOTE: This form will be used in connection with a determination of whether or not to specify an amount under Regulation 36:4320; all liquidation involving 505(a) loans; all liquidations of acquired loans or vendee accounts or direct loans.

1. NAME OF HOLDER	2. NAME OF VETERAN			
[illegible]	[illegible]			
3. LOAN NO.	4. LOAN GUARANTEED OR INSURED UNDER SECTION		5. REGIONAL OFFICE	6. DATE
LH6 925 80 4	[X] 501 [ ] 502 [ ] 503 [ ] 505(a)		VARO LA	4-8-76
7. LOAN ACQUIRED UNDER REGULATION [X] 36:4318 [ ] VENDEE ACCOUNT	FILL IN ONLY IF 505(a) LIEN ▶	8. IS LIQUIDATION PROPOSED ON [ ] PRIMARY LIEN [ ] 505(a) LIEN		

SIGNATURE OF CHIEF, LOAN SERVICE AND CLAIMS SECTION	SIGNATURE OF CHIEF, APPRAISAL SECTION
[illegible] 4/13/76	F. H. Mercer 4/15/76
SIGNATURE OF CHIEF, PROPERTY MANAGEMENT SECTION	SIGNATURE OF LOAN GUARANTY OFFICER
	[illegible]

REMARKS (Use reverse if additional space is needed.)

1. DEED-IN-LIEU ~~IS~~/IS NOT RECOMMENDED
2. REFUNDING ~~IS~~/IS NOT WARRANTED
3. OCCUPIED/~~VACANT AND SECURE~~
4. ~~TENANT~~/VETERAN

(30) VK EXHIBIT AF

INSTRUCTIONS: See Chapter 2, M 26-4

VA FORM MAR 1962 26-6713 Existing stocks of VA form VB4-6713, JUN 1953, may be used.

EXCERPT FROM ADMINISTRATIVE RECORD at 40.

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FILED
SEP 21 1982
ALEXANDER L. STEVAS

No. 82-103

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN AND DOLORES RANK, PETITIONERS

v.

ROBERT P. NIMMO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioners, a veteran and his wife, purchased a house in Pomona, California, in 1971 with a loan guaranteed by the Veterans Administration (Pet. App. 2, 86-87). The loan was secured by a mortgage on the property held by Trinity Mortgage Company and serviced by respondent Kissell Company. In February 1975, petitioners stopped making payments on their loan (Pet. App. 11). Respondent Kissell Company instituted foreclosure proceedings and, in April 1976, purchased the property at a non-judicial foreclosure sale. Just prior to foreclosure, the VA determined not to exercise its discretionary authority under 38 U.S.C. 1816(a) to receive an assignment of the defaulted loan and to refund it (Pet. App. 13-14).

Petitioners filed this lawsuit in the United States District Court for the Central District of California, seeking, in essence, to set aside the foreclosure sale (Pet. App. 14-15). On cross motions for summary judgment, the district court held that the federal respondents (the VA, its Administrator, and its Director for the Los Angeles Region) had not adequately serviced petitioners' loan and had failed to give proper consideration to the VA's assignment/refunding authority (Pet. App. 76-117; 460 F. Supp. 920).

The court of appeals reversed (Pet. App. 1-75; 677 F. 2d 692). In a comprehensive opinion, the court of appeals ruled that: (1) "the well-established principles of *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny compel the conclusion that no implied cause of action exists under the VA Act against the VA or the private lender for failure to help a veteran borrower avoid foreclosure" (Pet. App. 18; footnote omitted); (2) "the VA Act, by its terms, imposes no legal duty upon the VA to undertake loan servicing of VA-guaranteed loans" (Pet. App. 22); (3) the statutory provision authorizing VA funding of defaulted loans (38 U.S.C. 1816(a)) "makes clear that Congress intended to vest the widest discretion possible in the Administrator," precluding judicial review of his decisions to assign and refund loans in particular cases (Pet. App. 29-31); (4) "[n]othing in the statutory language or history of section 1816(a) indicates that Congress intended to require the VA to exercise the assignment-refunding option * * *" at any particular time (Pet. App. 32-33); and (5) "foreclosure by a private lender of a mortgage in a federal mortgage guaranty program does not involve federal action sufficient to invoke the due process clause of the Fifth Amendment" (Pet. App. 38). Judge Reinhardt dissented on the refunding issue only (Pet. App. 47-64).

2.a. Petitioners concede (Pet. 12) that the VA's decision whether to pay the unpaid balance of an obligation and

accept assignment of the loan and security under 38 U.S.C. 1816(a) is "committed to agency discretion" and therefore unreviewable. Petitioners vaguely assert (Pet. 15), however, that "when Congress grants an agency discretion, it intends that the discretion be exercised unless expressly stated otherwise." There is no reason for this Court to consider the possible application of that broad proposition in this case. The court of appeals correctly ruled that the VA is under no statutory obligation to establish specific procedures or a specific program for determining whether delinquent loans should be assigned and refunded. There is no conflict among the courts of appeals on that issue. Furthermore, in this case the VA specifically considered the assignment-refunding option and rejected it as inappropriate.

Section 1816(a) provides that upon notice of a veteran's default the VA "Administrator may, at the Administrator's option, pay the holder of the obligation the unpaid balance of the obligation plus accured interest and receive an assignment of the loan and security" (38 U.S.C. 1816(a)). As the court of appeals commented, this provision "makes clear that Congress intended to vest the widest discretion possible in the Administrator" (Pet. App. 29). "Congress * * * used the precatory 'may' and then, as if to leave no doubt, added, '*at the Administrator's option*' " (*ibid.*; emphasis in original). This grant of authority to the VA Administrator cannot be read to require any specific procedure or program for determining whether assignment or refunding is appropriate; it clearly does not contemplate the sort of formal determination that petitioners apparently envision. Indeed, the history of Section 1816(a) indicates that Congress did not have refunding in mind at all when it enacted the provision, but merely sought to provide the VA an alternative to paying the guaranty when veterans default. See Pet. App. 68-70; *Gatter* v. *Nimmo*, 672 F. 2d 343 (3d Cir. 1982).

b. At bottom, petitioners assert that the VA has generally ignored its authority to help veterans in distress through the refunding of mortgages. The record in this case indicates, however, that petitioners' mortgage was considered for assignment and refunding, but that option was rejected as "not warranted" (Pet. App. 14, 126).[1] No mortgages were refunded in the Los Angeles area between 1974 and 1976, the period when petitioners defaulted (*id.* at 113-114). But that circumstances does not indicate that the VA did not seriously consider the assignment/refunding option. The VA's usual practice is to persuade private lenders to maintain the mortgages of defaulting, but deserving, veterans, which would take care of most situations in which refunding might otherwise be appropriate. The VA must reserve refunding as a remedy for the extraordinary cases in which a lender refuses forbearance, but the risk to the VA of assignment is nonetheless insignificant. Absent a congressional mandate, and appropriation of money, to subsidize veterans who cannot afford their homes, a liberal assignment and refunding policy would effectively convert the VA's home loan guaranty program into a grant program, and would deplete funds for the guaranty program, to the detriment of veterans. Cf. *United States* v. *Shimer*, 367 U.S. 374, 387 (1961) ("the entire history of the 'home loan' provisions of the statute is inconsistent with an intent to make outright grants * * *.").

c. Contrary to petitioners' claims (Pet. 16-21), the decision of the court below does not conflict with any decision of this Court or a court of appeals. Neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941) is

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[1] At the time the VA decided not to exercise its assignment/refunding authority, petitioners had already received 16 months of forbearance by Kissell Company.

implicated here.[2] Petitioners cite a number of cases in support of their proposed rule that administrative agencies must exercise the discretion that Congress grants them (Pet. 16-23). We do not dispute that abstract principle. Nonetheless, as the court of appeals noted in considering several of the cases cited by petitioners, their common thread is an "applicable statute or legislative history [that] clearly revealed a Congressional intent to require the agency to implement a statutory program" (Pet. App. 34).[3] There is no statute or legislative history that requires VA action in the present context. See *Gatter* v. *Nimmo, supra; Fitzgerald* v. *Cleland*, 650 F. 2d 360, 361 (1st Cir. 1981), aff'g 498 F. Supp. 341, 351 (D. Me. 1980); *Simpson* v. *Cleland*, 640 F. 2d 1354 (D.C. Cir. 1981); cf. *United States* v. *Harvey*, 659 F. 2d 62 (5th Cir. 1981).[4]

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[2]In *Accardi*, the Board of Immigration Appeals allegedly failed to exercise independent judgment, improperly denying discretionary relief from deportation to an alien because the Attorney General had designated him an "unsavory" character. That case involved an adjudicatory proceeding in which the BIA was obliged by formal rules to exercise its discretion. Moreover, as noted above, the Administrator specifically considered the assignment-refunding option for petitioners and rejected it as "not warranted" (Pet. App. 126). The statement from *Phelps Dodge Corp.* upon which petitioners rely (Pet. 17) reflects the Court's concern about effective judicial review of NLRB remedial orders; as petitioners concede, judicial review is not a concern in this case.

[3]*United States* v. *Edwards*, 368 F. 2d 722 (4th Cir. 1966), does not conflict with the court of appeals' decision. *Edwards* established no rule of law, but simply remanded for further factfinding. Moreover, *Edwards* involved due process considerations because the government had seized the defendant's property for forfeiture. The court below held that the Due Process Clause was not implicated here (see Pet. App. 38), and petitioners do not challenge that holding.

[4]Significantly, in 1978 Congress considered a proposed amendment to 38 U.S.C. 1816(a), which would have provided that, prior to foreclosure, "the Administrator * * * *shall*, under regulations which the Administrator *shall* prescribe, investigate, with due regard for any reasonable forbearance by the Administrator for the benefit of the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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veteran, the desirability of * * * receiving an assignment of the loan * * *." See S. Rep. No. 95-1055, 95th Cong., 2d Sess. 6 (1978) (emphasis added). Although passed by the Senate, 124 Cong. Rec. 24622 (1978), the provision was dropped from the final bill (124 Cong. Rec. 32293 (1978)); 124 Cong. Rec. 33102 (1978). See Pub. L. No. 95-476, 92 Stat. 1497.

DOJ-1982-09